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In The

Supreme Court of the United States

October Term, 1977

No. 77-1756

THOMAS W. SHERWOOD,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, THIRD CIRCUIT

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In The

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No.

THOMAS W. SHERWOOD,

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vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Thomas W. Sherwood, prays that a writ of certiorari to the United States Court of Appeals, Third Circuit, will issue to review the judgment that the court entered on January 30, 1978.

CITATIONS TO OPINION BELOW

There was no opinion by the United States Court of Appeals, Third Circuit, but solely the judgment order. The judgment order is contained in its entirety in the Appendix hereto.

JURISDICTION

The judgment of the United States Court of Appeals, Third Circuit, was rendered on January 5, 1978.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1). Petitioner has been deprived of his First and Fifth Amendment rights guaranteed by the United States Constitution.

QUESTIONS PRESENTED

1. Whether the trial court erred in failing to charge the jury that some of the material allegedly mailed by the petitioner must be shown to have appeal to the prurient interests of homosexuals, pursuant to *Mishkin v. New York*, 86 S. Ct. 958 (1966) and *United States v. Klaw*, 350 F.2d 155 (C.A. 2 1965).

2. Whether the Government failed to meet its burden of proof by not producing proof that the materials allegedly mailed appealed to the prurient interests of a deviant audience, pursuant to *Mishkin v. New York*, 86 S. Ct. 958 (1966) and *United States v. Klaw*, 350 F.2d 155 (C.A. 2 1965), and *Paris Adult Theatre I v. Slaton*, 413 U.S. 39 (1973).

3. Whether the denial of petitioner's request for a continuance was an abuse of judicial discretion, and deprived the petitioner of due process of law.

4. Whether the failure of the Government to supply exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and the failure of the Government to supply exculpatory material well in advance of the trial deprived the petitioner of due process of law pursuant to the Fifth Amendment of the United States Constitution and mandates dismissal of the indictment.

5. Whether the failure of the United States Government to instruct the members of the Grand Jury of the component elements of the alleged crime deprived this petitioner of his right to due process of law pursuant to the Fifth Amendment of the United States Constitution.

6. Whether the charging of the multiplicity of counts in the indictment to cover a course of conduct constituted sufficient prejudice so as to deny the petitioner due process of law.

7. Whether the trial court erred in not dismissing the indictment herein based upon the fact that the United States Government through the Post Office Department openly and publicly advertised and sold the same materials which are the subject of this prosecution.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The relevant constitutional provisions and statutes involved are: 18 U.S.C. Section 1461; 18 C.P.S.A. 5903(a); Federal Rules of Criminal Practice, Rule 16; First and Fifth Amendments to the United States Constitution.

STATEMENT OF THE CASE

In July, 1976, the petitioner was indicted and charged with thirty-one (31) violations of Title 18 U.S.C. Section 1461 (Appendix, 4a-23a). The petitioner pleaded not guilty and the matter was noticed for trial on November 8, 1976.

Between the date of the indictment and that of the trial, the petitioner was advised that the content of two (2) adult book stores in the City of Philadelphia had been seized by the Internal Revenue Service, which inventoried the materials, sent out mailings to various individuals relative to the availability of purchase of the impounded books, magazines and films, and set

forth the date of the acceptance of sealed bids in an auction-type proceeding. The petitioner was able to determine that some or all of the material impounded by the Internal Revenue Service; advertised by mail; and sold by it were the materials that are the subject of the within indictment.

Pursuant to *Brady v. Maryland*, 373 U.S. 83 (1973), a demand was made upon the United States Attorney to supply full information with respect to the seizure and the sale by the Internal Revenue Service. The United States Government denied knowledge of the activities of the Internal Revenue Service, and set forth that it was not privy to the records of the Internal Revenue Service. Inquiries made to the Internal Revenue Service in the City of Philadelphia and in the District of Columbia were not responded to until after the trial was both commenced and completed.

A request was made for a continuance to the trial court so that discovery could be completed relative to the prior sale by the United States Government of identical and/or comparable material and the utilization of the mails by the United States Government to effectuate the sales.

On November 16, 1976, the petitioner, after a jury trial was found guilty of Counts 1 through 9, Count 12, Count 24, and Counts 26 through 31 as charged in the indictment. On November 22, 1976, application was made to the trial court to set aside the verdict; for a judgment of acquittal; or in the alternative, for a new trial. The motion of the petitioner was denied in its entirety by the court as is exemplified by a memorandum and order dated March 30, 1977 (24a).

On April 22, 1977, the petitioner was fined the sum of $1,000 on Count 1, and the imposition of sentence as to imprisonment was suspended, and the petitioner was placed on probation for a period of three (3) years. With respect to Counts 2 through 9, Count 12, Count 24 and Counts 26 through 31, the petitioner was fined the sum of $1,000 on each count, and the

imposition of sentence as to imprisonment was suspended, and the petitioner was placed on probation for a period of three (3) years. The term of probation on Counts 2 through 9, Count 12, Count 24, and Counts 26 through 31 were to run concurrently with the probation on Count 1.

FEDERAL APPELLATE ACTION

Petitioner timely filed his appeal in the United States Court of Appeals, Third Circuit. The Third Circuit, in its judgment, solely set forth that they found no error, and set forth no determination relative to the issues raised by the petitioner.

REASONS FOR GRANTING THE WRIT

I.

Whether the trial court erred in failing to charge the jury that some of the material allegedly mailed by the petitioner must be shown to have appeal to the prurient interests of homosexuals, pursuant to *Mishkin v. New York*, 86 S. Ct. 958 (1966) and *United States v. Klaw*, 350 F.2d 155 (C.A. 2 1965).

At the end of the Government's case, a motion was made for a dismissal of Counts 2, 3, 6, 7, 9, 15, 18, 26, 27 and 28 based upon the fact that the material concerned itself with homosexual activity, and that it was the contention of the petitioner that such material was designed and aimed at a clearly deviant group. The petitioner set forth that the Government had failed in every way to acquit its burden of proof with respect to proving these specific materials obscene. Petitioner relied, for this proposition, on the opinion of the court in *Mishkin v. New York, supra,* which stated in part:

> "Where the material is *designed for and primarily disseminated* to a *clearly defined* deviant sexual group, rather than the public at large, the

prurient-appeal requirement of the *Roth* test is satisfied if the dominant theme of the material taken as a whole appeals to the prurient interest in sex of the members of that group. The reference to the 'average' or 'normal' person in *Roth*, 354 U.S. at 489-490, 77 S. Ct., at 1311, does not foreclose this holding. In regard to the prurient-appeal requirement, the concept of the 'average' or 'normal' person was employed in *Roth* to serve the essentially negative purpose of expressing our rejection of that aspect of the *Hicklin* test, *Regina v. Hicklin* (1868) L.R. 3 Q.B. 360, that made the impact on the most susceptible person determinative. We adjust the prurient-appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group; and since our holding requires that the recipient group be defined with more specificity than in terms of sexually immature persons, it also avoids the inadequacy of the most-susceptible-person facet of the *Hicklin* test." 383 U.S. at 508-509, 86 S. Ct. at 963-964. (Emphasis added.)

In the motion for a directed verdict or in the alternative for a new trial, the trial court did not address itself to the question of the content of its charge, and its denial of the charge that had been requested by the petitioner with respect to appeal to the prurient interest of deviants. It can only be concluded that the Third Circuit, by solely rendering a judgment and not filing an opinion, adopted the determination made by the trial court. As a consequence, neither the trial court nor the Third Circuit had addressed itself to the question of the necessity of a specified charge relative to the question of appeal to the prurient interest of deviants.

In *Hamling v. United States*, 418 U.S. 87 (1974), this Court did not purport to retreat from its exposition of the principles governing bizarre materials in *Mishkin v. New York*, 383 U.S. 501 (1966). The issue considered in *Hamling* was whether the jurors could consider whether some portions of a work appealed to "a prurient interest of a specifically defined deviant group as well as whether they appealed to the prurient interest of the average person." 418 U.S. at 128. In *Hamling*, as in *Mishkin*, there was ample evidence of circumstances of production and massive distribution from which some inference could be drawn as to the design and dissemination of deviant materials to an "intended and probable recipient group." *Mishkin v. New York*, 383 U.S. 502 (1966), quoted in *Hamling v. United States*, 418 U.S. at 129. The *Hamling* opinion fully restated the language in *Mishkin* referring to material "designed for and primarily disseminated to a clearly defined deviant group." *Id.* at 129. In the instant case, not only was evidence on this subject totally lacking, but the jury was not even instructed to consider the design and pattern of dissemination of the materials.

By construing the language in *Mishkin*, quoted in *Hamling*, as mere surplusage and truncating the prerequisites for submitting the issue of deviant sexual appeal to the jury, the court below has departed from the standards set down by this Court in a manner which calls for review upon certiorari.

II.

Whether the Government failed to meet its burden of proof by not producing proof that the materials allegedly mailed appealed to the prurient interests of a deviant audience, pursuant to *Mishkin v. New York*, 86 S. Ct. 958 (1966) and *United States v. Klaw*, 350 F.2d 155 (C.A. 2, 1965), and *Paris Adult Theatre I v. Slaton*, 413 U.S. 39 (1973).

An overview of the material that was involved in the prosecution reveals to the Court that we are not dealing with

films and magazines that would appeal to the average person of average sexual appetite. We are dealing with a deviant from that average man. In the opinion of the trial court of March 30, 1977, the trial court set forth "several of the books and magazines in evidence are intended to appeal to a deviant sexual group; to wit, homosexuals." The Government couched its entire presentation that the material was such as to appeal to the prurient interest of the average person. Despite the concession of the trial court in its opinion, the Government failed to set forth that the material was designed for and primarily disseminated to a clearly defined, deviant sexual group. The Government failed to define the deviant sexual group as opposed to the public at large. The Government failed to set forth that the dominant theme of the material herein taken as a whole appealed to the prurient interest in sex of the members of that group. The position of both the trial court and the Government was that expert testimony was not necessary for the jury to conclude that the materials were obscene. The court in its opinion set forth that the materials and photographs depicted rather unusual homosexual activities but that taken as a whole, they were not alien to the realm of common experience.

It is important for this Court to note that there were photographs of the insertion into the rectum of one male of the hand, wrist and forearm of another male, in the publication called "Erotic Hands." It is submitted that it can hardly be said that the depiction is not alien to the realm of common experience and that the depiction could be the basis for a conclusion that the materials would appeal to the prurient interest without some expert guidance. The petitioner would concede that the photographs herein described are repulsive, loathesome, disgusting and vulgar, but that under no circumstances can they be said, *res ipsa loquintor,* to appeal to the prurient interests of the average person. It is for that reason that the Supreme Court, in *Paris Adult Theatre I v. Slaton,* 413 U.S. 39, in footnote 6, set forth that there were instances where the experience of the trier of fact would be plainly inadequate to

judge whether the material appealed to the prurient interest. That situation exists here, without doubt, with respect to "Erotic Hands", and it is submitted that it appeals to all of the other material that is addressed to homosexuals.

By not requiring the Government to meet its burden of proof, the Court below has departed from the standards set down by this Court in *Miller v. California,* 413 U.S. 15 (1973), and calls for review upon certiorari.

III.

Whether the denial of petitioner's request for a continuance was an abuse of judicial discretion, and deprived the petitioner of due process of law.

An order of discovery was entered wherein the United States Government was required to provide access for discovery to the petitioner together with an obligation to make available all exculpatory material pursuant to *Brady v. Maryland, supra.* The order contained a provision that there was a continuing duty upon the United States Government to furnish such discovery and exculpatory material. Subsequent to the entry of this order, discovery was obtained from the United States Government on behalf of petitioner.

In and about September 22, 1976, information was received on behalf of the petitioner that the Internal Revenue Service had seized the contents of two (2) adult book stores in Philadelphia in satisfaction of tax liability and had disposed of the seized goods by sealed bid sale soliciting bids in part by notices sent through the United States mail. Petitioner also had reason to believe that the material seized and sold by the Internal Revenue Service was identical to the material that he had been indicted for distributing.

On September 22, 1976, a letter was written on behalf of the petitioner to the United States Attorney requesting full details of the Internal Revenue Service activities. On September 29, 1976, the United States Attorney set forth that his office had no knowledge of the matter, and that inquiry should be made directly to Internal Revenue Service.

Letters of inquiry were sent to the Philadelphia office and the District of Columbia office of the Internal Revenue Service on October 19, 1976. At the same time, a letter was sent to the court requesting a continuance so that adequate time could be had for the determination of the details of the Internal Revenue Service activities. The court refused to grant a continuance, and the trial commenced as scheduled on Monday, November 8.

On November 4, 1976, a formal notice of motion supported by an affidavit and brief were filed in the Office of the Clerk of the United States District Court for the Middle District of Pennsylvania requesting a continuance, and setting forth the reasons for the need of such continuance relating to the IRS activities. It was pointed out that no response had been received from the IRS directly, and that nothing further had been obtained from the United States Government.

On the morning of November 8, 1976, prior to the selection of the jury herein, the United States Government furnished the attorney for the petitioner with material that the Government represented it had not received from the Internal Revenue Service until November 5, 1976. This material consisted of a Notice of Seizure, listing items that were seized, three (3) Notices of Sale, two (2) of which had been published in the Philadelphia Inquirer, and one (1) of which had been distributed to prospective bidders through the mails, and a Certificate of Sale of seized property. Upon receipt of this material, the attorney for the petitioner renewed his motion for a continuance so as to obtain sufficient time to investigate the matter. This application was also refused by the trial court.

The petitioner's contention that the information concerning the seizure and sale of adult material by the IRS was exculpatory material within the purview of *Brady v. Maryland, supra,* was acknowledged by the trial court in its opinion of March 30, 1977. The trial court conceded that the sale by the Government of films and magazines identical to those which are the subject of the indictment, while not excusing defendant's activities, is certainly powerful evidence that the material in evidence does not offend contemporary community standards. The court went on to say that the petitioner in no way should have been prevented from putting such evidence before the jury. The trial court felt that the late disclosure did not hamper the presentation of the defendant's case sufficiently to require that the verdict be set aside.

It is submitted to this Court that the petitioner was relegated to obtaining the necessary information relative to comparables; contemporary community standards; and exculpatory material relative to sales and mailings by the Government during the same period that the petitioner was on trial. The trial commenced on November 8, 1976 as scheduled, and both the petitioner and his attorney were directly involved in the City of Harrisburg with respect to the conduct of the trial while investigation would have had to have taken place in the City of Philadelphia.

It is readily conceded that the granting of continuance as a matter of discretion for the trial court, that it is submitted that the denial herein constituted an abuse of such discretion. In the hearing of November 8, 1976, based upon the formal motion that had been previously filed, the court denied the defense motion for a continuance for the reason that the motion came too late. There is no way that the motion could have come any sooner since the material upon which the motion was predicated was delivered to the attorneys for the defendant just minutes before the argument on the motion. In the very same hearing, the court set forth that the picking of the jury would take place

during that day and that since it was going to take the Government a day and a half to two days to present its case, that the petitioner would have an opportunity during that time to see what he could discover.

In response to the court's determination, the attorney for the petitioner set forth that the material submitted to him just some moments before set forth that there were 640 magazines; 995 paperback books; 42 newspapers; and 1,281 adult films. The attorney further set forth that in the two (2) days while he would be occupied in trying the case, it would be impossible to go out into the street and amass what was in excess of 2,500 separate items.

At no time did the United States Government set forth any reason why it did not receive any information from the Internal Revenue Service prior to November 5, 1976. It is not intended to set forth that Internal Revenue was aware that the trial was to commence November 8, 1976, but Internal Revenue had been on notice with respect to the need for this information as early as October, 1976, when letters were sent to it directly and September 22, 1976, when letters were sent to the United States Attorney, which is an equal arm of the United States Government. As a consequence of the denial of the application for a continuance, the petitioner was prejudiced by not being able to fully interview employees of the Internal Revenue Service. It was not until November 10, 1976, that the petitioner was able to even speak with Paul Marcella. Certainly, the witness stand was no place to discuss the activities of Mr. Marcella with respect to the seizure and the sale of comparable adult material. The petitioner should have been given ample opportunity to inquire into the methods that were used by Mr. Marcella for the determination of the value of the materials that were seized, and further, why he determined that he could accept a lesser figure than the assessed value that had been placed thereon. The petitioner should have been given an opportunity to inquire as to all of the deviations and statutory requirements

in which the Internal Revenue Service participated. Most importantly, the petitioner would have had a full opportunity to inquire as to whether or not there had been any concern, study or inquiry by employees of the Internal Revenue Service as to whether or not the materials that were seized were contraband and could or could not be advertised through the mails.

The denial by the trial court to allow the development of the *Brady* material which was not delivered until the actual morning of the trial was a total denial of due process of law and mandates a review leading to a setting aside of the verdict herein.

IV.

Whether the failure of the Government to supply exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963) and the failure of the Government to supply exculpatory material well in advance of the trial deprived the petitioner of due process of law pursuant to the Fifth Amendment of the United States Constitution and mandates dismissal of the indictment.

The purpose of the letters to the trial court of November 19, 1976, and the formal motion that was filed on November 4, 1976, were for the purposes of further discovery and development of information obtained through such discovery.

When the United States Government supplied *Brady* material on the morning of the trial, November 8, 1976, it was necessary that the petitioner be given an opportunity to both understand the content of such discovery, and to further develop it from the point of view of exculpation, the establishment of contemporary community standards, and to set forth that the Government had mailed identical and/or similar material through the mails. Courts have explicitly held that under *Brady v. Maryland, supra,* favorable evidence must be disclosed by the

prosecution well in advance of trial. *United States v. Leichtfuss,* 331 F. Supp. 23 (N.D. 111, 1971); *United States v. Ladd,* 48 F.R.D. 266 (D. Alas. 1969); *United States v. Gleason,* 265 F. Supp. 880 (F.D.N.Y. 1967). It is readily understandable that no or little benefit is derived by the defendant if he is not provided with *Brady* material well in advance of the trial so that resort can be made for the preparation of the defense. Certainly, where the material is delivered immediately prior to the picking of the jury, and the commencement of the trial, the benefits of the *Brady* material have been in the main or totally negated. It is submitted to this Court that a disclosure on the very morning of the commencement of the trial, in truth, amounts to no disclosure at all. Petitioner's development of the *Brady* material concerned how the IRS could proceed to sell what might be patently contraband material. The petitioner desired to fully explore the entire decision making machinery of the Internal Revenue Service regarding the determination that these materials could be advertised through the mails and sold by the Internal Revenue Service.

In the development of this *Brady* material, the petitioner should have been given an opportunity to thoroughly question the method by which the appraised figure and knocked-down price were arrived at, and shouid not have been relegated to the testimony that eminated from the witness stand on what was the fourth day of the trial and the first day when the defendant began to enter his defense. The petitioner was entitled to investigate whether the sale of these materials by the Internal Revenue Service was an indication by the United States Government, through one of its departments, had made a considered determination that the material sold by the Internal Revenue Service were not obscene, and were generally accepted and tolerated by the public. The petitioner could also have determined the basis upon which the Internal Revenue Service had determined that these materials could be advertised through the mails without violation of law. The petitioner does not take the position that Internal Revenue was precluded from seizing

assets for tax delinquency. Petitioner points out to the Court that the Internal Revenue Service would have taken the necessary steps to insure that prescription or potentially contraband drugs would not be sold in the offering to the general public of assets that were seized. The petitioner would have sought the basis for the determination of Internal Revenue Service that it had the ability to both solicit bids by mail, and to sell the material that was the subject herein.

In his argument, the petitioner set forth that he wanted the continuance to develop the concept of contemporary community standards, and also to obtain exculpatory material. The Government set forth that such evidence would not be relevant, and therefore the continuance should not be granted. It is set forth that *Brady* cannot be limited to material or information demonstrated in advance to be competent material. *United States v. Gleason, supra. Brady* deals with exculpatory material which need not be admissable in court but which provides leads to other evidence. *United States v. Ahmad,* 53 F.R.D. 186 (N.D. Pa., 1971). Furthermore, the evidence which must be disclosed need not be direct evidence, but can also be that which is merely impeaching of Government witnesses. In essence, the courts have withdrawn from the prosecutor the right to prejudge the admissibility of *Brady* material.

As a consequence of the denial of the application for a continuance, this Court should take this matter under certiorari.

V.

Whether the failure of the United States Government to instruct the members of the Grand Jury of the component elements of the alleged crime deprived this petitioner of his right to due process of law pursuant to the Fifth Amendment of the United States Constitution.

An application was made to the trial court on November 4, 1976, for the ability to review Grand Jury Minutes. On November 8, 1976, a hearing was held on this point, and the application of the petitioner was denied. The petitioner submitted that the application of the test laid down in *Roth v. United States*, 354 U.S. 476 and in *Miller v. California, supra*, is one of complexity. The person applying the test must balance his view of the content of the material under examination judging its patent offensiveness and prurient interest appeal, *Manuel Enterprises, Inc. v. Day*, 82 S. Ct. 1432, against the interest of society as a whole in the protection of the fundamental constitutional guarantees of freedom of expression. In its application, the test cannot be diluted in any manner by the personal dislikes or personal moral judgments of the person applying it. It was the duty of the United States Attorney to instruct the Grand Jury with respect to patent offensiveness, prurient appeal, and the interest of society and the protection of the fundamental constitutional guarantee of freedom of expression. The failure to so do would prevent Grand Jurors from making an intelligent determination of whether or not the materials that were exhibited to them actually reflected material that might be obscene.

The request for a review of the Grand Jury Minutes was to determine whether or not the United States Attorney had acquitted this responsibility as a prelude to the obtaining of an indictment.

During the course of the argument before the trial court on November 8, 1976, the United States Attorney set forth that

there were no minutes that were kept of the Grand Jury proceedings. He went further and stated that he had conducted the Grand Jury. At no time did the United States Attorney ever represent that he had instructed the members of the Grand Jury with respect to the constitutional elements required to determine material to be obscene and not entitled to the protection of the First Amendment.

This denial of due process of law requires the granting of the within writ of certiorari.

VI.

Whether the charging of the multiplicity of counts in the indictment to cover a course of conduct constituted sufficient prejudice so as to deny the petitioner due process of law.

The original indictment herein consisted of thirty-one (31) separate counts alleging the use of the mails for the transmitting of either magazines and films, or advertisements soliciting the purchase of such magazines and films. During the course of the trial, four (4) of the counts were dismissed by the court, and twenty-seven (27) counts were submitted to the jury. The jury could not avoid being impressed by having that great a number of individual allegedly criminal acts presented to them as having been committed by the petitioner. The court's denial of the motion made at the State's case to consolidate the remaining twenty-seven (27) counts into a count involving the mailing of advertising material, and a separate count of mailing specific exhibits should have been granted by the trial court.

In *Bramblett v. United States*, 231 F.2d 489, the court stated that in construing a criminal statute, doubt should be resolved that avoids subjecting a defendant to multiple convictions by use of a single, unified pattern of behavior, even though the behavior continued over a period of time.

There can be no question that the behavior herein, as exemplified by the indictment, shows that it existed for some months. Neither the indictment nor the evidence adduced at the trial shows that the defendant herein was involved in conduct other than mailing advertisements and mailing magazines and films, and the specific individual acts thereof should not have been set forth as individual counts thereof, nor should they have been submitted to the jury as individual criminal acts.

The attention of the Court is respectfully directed to *DiMenza v. Johnston,* 130 F.2d 465, where the court set forth the test in determining whether more than one offense is charged in an indictment or denounced by statute, is whether or not each proposed offense requires proof of some fact which the others do not.

In the instant matter, the only difference in the proof adduced by the Government was the name of the individual requesting the mailing of material or advertisements and the date when such material or advertisements were sent. In all other respects, the activity on the part of the postal inspectors and the petitioner was absolutely uniform relative to each and every count of the indictment.

In *United States v. Harmon,* 38 F. 827 (1889), a long indictment was involved, based upon an article that was mailed at different times. On page 829:

> "I have serious doubt whether the publisher of an obscene paper can be convicted of a separate offense for every person to whom he mails that particular issue of the paper."

It is respectfully submitted to the Court that advertisements which were identical were sent to different individuals at various times by this petitioner. As a consequence, he now stands convicted of individual counts, despite the fact that the same

materials were mailed to different persons. Pursuant to *Harmon, supra,* that would not constitute a separate offense but rather, would constitute an offense, as dictated by the concept of course of conduct.

The prejudicial effect upon the jury of being presented with multiple counts mandates the grant of this writ of certiorari.

VII.

Whether the trial court erred in not dismissing the indictment herein based upon the fact that the United States Government through the Post Office Department openly and publicly advertised and sold the same materials which are the subject of this prosecution.

Since one must presume that the Internal Revenue Service did not determine to violate the law relative to using the mails for the purpose of advertising the availability of adult material, and since one must presume that the Internal Revenue Service did not undertake to sell obscene materials, in violation of 18 U.S.C.A. §1461, it must be concluded that the Internal Revenue Service determined that the materials were not obscene and that the advertising of their existence and availability would not be a violation of the subject statute.

As a consequence of the fact that these materials were openly advertised and sold by the Internal Revenue Service, the court should have reviewed the material itself and made a determination as a matter of law that they were not obscene.

In *Jacobellis v. Ohio,* 378 U.S. 184 (1964), Mr. Justice Brennan said:

> ". . . Such an abnegation of judicial supervision in this field would be inconsistent with our duty to uphold the constitutional guarantees. Since it

is only 'obscenity' that is excluded from the constitutional protection, the question whether a particular work is obscene necessarily implicates an issue of constitutional law. See *Roth v. U.S.*, supra, 354 U.S. at 497-498, 77 S.Ct., at 1315-1316 (separate opinion). Such an issue, we think, must ultimately be decided by this Court. Our duty admits of no 'substitute for facing up to the tough individual problems of constitutional judgment involved in every obscenity case.' Id., 354 U.S., at 498, 77 S.Ct., at 1316 , see *Manual Enterprises, Inc. v. Day*, 370 U.S. 478, 488, 82 S.Ct. 1432, 1437, 8 L.Ed. 2d 639 (opinion of Harlan, J.).

In other areas involving constitutional rights under the Due Process Clause, the Court has consistently recognized its duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case. E.g., *Watts v. Indiana*, 338 U.S. 49, 51, 69 S.Ct. 1347, 1348, 93 L.Ed. 1801; *Norris v. Alabama*, 294 U.S. 587, 590, 55 S.Ct. 579, 580, 79 L.Ed. 1074. And this has been particularly true where rights have been asserted under the First Amendment guarantees of free expression."

The attention of the Court is also called to *United States of America v. I Am Curious-Yellow*, 404 F.2d 196 (C.A. 2, 1968), where the court said:

> ". . . However, in our view obscenity vel non is not an issue of fact with respect to which the jury's finding has its usual conclusive effect. It is rather an issue of constitutional law that must eventually be decided by the court. As Mr. Justice Harlan said in *Roth v. U.S.*, 354 U.S. 476, 497-98 (1957) (concurring and dissenting):

> 'If "obscenity" is to be suppressed, the question whether a particular work is of that character involves not really an issue of fact but a question of constitutional judgment of the most sensitive and delicate kind. Many juries might find that Joyce's "Ulysses" or Boccaccio's "Decameron" was obscene, and yet the conviction of a defendant for selling either book would raise, for me, the gravest constitutional problems, for no such verdict could convince me, without more, that these books are "utterly without redeeming social importance."'"

As a consequence of the foregoing, it is submitted that it is the duty of this Court to view the materials and to view the circumstances of their distribution not only by this petitioner but also by the Internal Revenue Service and to make a determination as a matter of constitutional law as to whether or not these materials are obscene.

CONCLUSION

The petitioner herein was denied basic, fundamental rights guaranteed him by the United States Constitution. He seeks relief in this Court to restore those rights to him. Based upon the arguments and authorities cited herein, petitioner, Thomas W. Sherwood, urges this Honorable Court to grant this petition for writ of certiorari to the United States Court of Appeals, Third Circuit, and reverse his conviction and sentence thereon.

Respectfully submitted,

s/ Robert E. Levy

ROBERT E. LEVY
Attorney for Petitioner

Dated: May 3, 1978

APPENDIX 1 — JUDGMENT OF THE COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES OF AMERICA
FOR THE THIRD CIRCUIT

NO. 77-1658

UNITED STATES OF AMERICA

vs.

SHERWOOD, THOMAS W. d/b/a
SOVEREIGN ADVERTISING CO., INC.

Appellant

(D.C. Crim. No. 76-101-1)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Submitted Under Third Circuit Rule 12(6)
January 5, 1978

Before GIBBONS, GARTH, *Circuit Judges*, and WEINER,*
District Judge

---

* Honorable Charles R. Weiner, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix I

Philip Wilens, Chief
Government Regulations and Labor Section
Criminal Division
Robert Kendall, Jr., Attorney
Department of Justice
Washington, D.C. 20530
S. John Cotton
United States Attorney
Harrisburg, Pennsylvania 17101
Attorneys for Appellee

Robert E. Levy, Esquire
1319 Memorial Drive
P.O. Box 901
Asbury Park, New Jersey 07712
Attorney for Appellant

JUDGMENT ORDER

Thomas W. Sherwood, convicted of violating 18 U.S.C. §1461, on this appeal from a judgment of sentence contends:

1. that application of 18 U.S.C. §1461 to residents of and events entirely within Pennsylvania violates due process of law;

2. that the court erred in failing to charge that some of the materials he mailed must appeal to prurient interests of homosexuals;

3. that the government did not prove that some of the materials he mailed appealed to prurient interests of a deviant audience;

4. that the denial of a continuance deprived him of due process;

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5. that the government's late action in furnishing *Brady* materials prejudiced his right to a fair trial;

6. that the indictment should have been dismissed because the court did not charge the grand jury the elements of the offense;

7. that the indictment is multiplicious;

8. that the absence of an obscenity law in Pennsylvania establishes as a matter of law that the materials he mailed met contemporary community standards.

We find no error.

It is therefore O R D E R E D and A D J U D G E D that the judgment of the District Court is affirmed.

By the Court,

s/ John J. Gibbons
Circuit Judge

Attest
s/ Thomas F. Quinn
Thomas F. Quinn
Clerk

Dated: January 6, 1978

Certified as a true copy and issued in lieu of a formal mandate on January 30, 1978.

Test: THOMAS F. QUINN

Clerk, United States Court of Appeals
for the Third Circuit

APPENDIX 2 — INDICTMENT OF THE UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

CRIMINAL NO. 76-101

VIO: 18 U.S.C. 1461

FILED
Harrisburg, Pa.
Jul. 21, 1976
D.A. Berry, Clerk
Deputy Clerk

INDICTMENT

THE GRAND JURY CHARGES:

COUNT I

That on or about March 12, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

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did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain envelope from the Eastern District of Pennsylvania to Robert McGrath, P.O. Box 800, Chambersburg, Pa. 17201, which envelope contained advertisements giving information where, how, from whom, and by what means obscene, lewd, lascivious, indecent, filthy, and vile articles, matters and things might be obtained.

In violation of Title 18, United States Code, Section 1461

THE GRAND JURY FURTHER CHARGES:

COUNT II

That on or about April 14, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING, CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the directions thereon, a certain mailing envelope, from the Eastern District of Pennsylvania to Robert McGrath, P.O. Box 800, Chambersburg, Pa., 17201, which mailing envelope contained obscene lewd, lascivious, indecent, filthy, and vile magazines entitled "Virgin Territory Big-Young and Hard", depicting various males in acts of fellatio, sodomy, masturbation, ejaculation, and oral stimulation of the anus; "Bad and Bold", depicts two males and two females engaged in fellatio, cunnilingus, intercourse, masturbation, and ejaculation.

In violation of Title 18, United States Code, Section 1461

THE GRAND JURY FURTHER CHARGES:

COUNT III

That on April 23, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the directions thereon, a certain mailing envelope from the Eastern District of Pennsylvania to Ron Kirby, RD #3, Loganton, Pa. 17747, which mailing envelope contained obscene, lewd, lascivious, indecent, filthy, and vile magazines entitled "The Cruiser", which depicts various males engaged in sodomy, masturbation, fellatio and ejaculation; "Hotel Orgy-No. 1", which depicts various males and females engaged in fallatio, masturbation, cunnilingus, intercourse and ejaculation; "Hotel Orgy-No. 2", which depicts various males and females engaged in sodomy, fellatio, masturbation, intercourse, cunnilingus and ejaculation.

In violation of Title 18, United States Code, Section 1461

THE GRAND JURY FURTHER CHARGES:

COUNT IV

That on or about April 23, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING, CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain envelope from the Eastern District of Pennsylvania to Ron Kirby, RD #3, Loganton, Pa. 17747, which envelope contained advertisements giving information where, how, from whom, and by what means obscene, lewd, lascivious, indecent, filthy, and vile articles, matters and things might be obtained.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT V

That on or about April 22, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING, CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain envelope from the Eastern District of Pennsylvania to Robert McGrath, P.O. Box 800, Chambersburg, Pa. 17201, which envelope contained advertisements giving information where, how, from whom, and by what means obscene, lewd, lascivious, indecent, filthy, and vile articles, matters and things might be obtained.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT VI

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That on or about April 30, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain package from the Eastern District of Pennsylvania to Neal Gallagher, P.O. Box 192, Aspers, Pa. 17304, which package contained obscene, lewd, lascivious, indecent, filthy, and vile magazine entitled "Man Date", depicting two males posing in various nude positions; a 200 feet roll of 8 mm, black and white movie film entitled "NM5", depicting two males engaged in masturbation, fellatio, sodomy, and ejaculation.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT VII

That on or about April 30, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did cause to be delivered by mail according to the direction thereon, a certain mailing envelope from the Eastern District of Pennsylvania to Paul Corpel, P.O. Box 231, Bendersville, Pa. 17306, which envelope contained obscene, lewd, lascivious, indecent, filthy, and vile 200 feet roll of 8 mm, color movie film entitled "All the Way", which

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depicts two females and one male engaged in masturbation, fellatio, intercourse, sodomy and ejaculation; also included in this mailing was a magazine entitled "Whippersnapper", which depicts various males and females involved in simulated acts of sadism and masochism.

In violation of Title 18, United States Code, Section 1461

THE GRAND JURY FURTHER CHARGES:

COUNT VIII

That on or about May 6, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain envelope from the Eastern District of Pennsylvania to Ron Kirby, RD #3, Loganton, Pa. 17747, which envelope contained advertisements giving information where, how, from whom, and by what means obscene, lewd, lascivious, indecent, filthy, and vile articles, matters, and things might be obtained.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT IX

That on or about May 12, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVERIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the directions thereon, a certain mailing envelope from the Eastern District of Pennsylvania to T. Braswell, P.O. Box 500, Biglerville, Pa. 17307, which mailing envelope contained obscene, lewd, lascivious, indecent, filthy, and vile four (4) 200 feet rolls of 8 mm, color movie films entitled "The Sexpot", which depicts a male and female engaged in fellatio and cunnilingus; "Venus No. 11", "Tiger Girl", depicts a male and female engaged in fellatio, cunnilingus, intercourse and ejaculation; "NM20", depicts two males engaged in sodomy, masturbation, fellatio and ejaculation; "Gay Studs 5" depicts two males engaged in acts of masturbation, fellatio, sodomy and ejaculation.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT X

That on or about May 12, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the directions thereon, a certain mailing envelope from the Eastern District of Pennsylvania to T. Braswell, P.O. Box 500, Biglerville, Pa. 17307, which envelope contained advertisements giving information where, how, from

whom, and by what means obscene lewd, lascivious, indecent, filthy, and vile articles, matters, and things might be obtained.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT XI

That on or about May 21, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain envelope from the Eastern District of Pennsylvania to Ron Kirby, RD #3, Loganton, Pa. 17747, which envelope contained advertisements giving information where, how, from whom, and by what means obscene, lewd, lascivious, indecent, filthy, and vile articles, matters and things might be obtained.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT XII

That on or about June 3, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the directions thereon, a certain envelope from the Eastern District of Pennsylvania to T. Braswell, P.O. Box 500, Biglerville. Pa. 17307, which envelope contained advertisements giving information where, how, from whom, and by what means obscene, lewd, lascivious, indecent, filthy, and vile articles, matters and things might be obtained.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT XIII

That on or about June 3, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the directions thereon, a certain envelope from the Eastern District of Pennsylvania to Ron Kirby, RD #3, Loganton, Pa. 17747, which envelope contained advertisements giving information where, how, from whom, and by what means obscene, lewd, lascivious, indecent, filthy, and vile articles, matters, and things might be obtained.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT XIV

That on or about June 10, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the directions thereon, a certain envelope from the Eastern District of Pennsylvania to James Maxwell, P.O. Box 1069, Gettysburg, Pa. 17325, which envelope contained advertisements giving information where, how, from whom, and by what means obscene, lewd, lascivious, indecent, filthy, and vile articles, matters and things might be obtained.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT XV

That on or about June 16, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the directions thereon, a certain mailing envelope from the Eastern District of Pennsylvania to Ron Kirby, RD #3, Loganton, Pa. 17747, which mailing envelope contained obscene, lewd, lascivious, indecent, filthy, and vile 200 feet roll of 8 mm color movie film entitled "Back-Row Part 6", which depicts three males engaged in fellatio, masturbation, sodomy, ejaculation; also included a magazine

entitled "Head Master Water Sport", which depicts various males engaged in masturbation, fellatio, sodomy, and ejaculation.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT XVI

That on or about June 17, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the directions thereon, a certain mailing envelope from the Eastern District of Pennsylvania to T. Braswell, P.O. Box 500, Biglerville, Pa. 17307, which envelope contained advertisements giving information where, how, from whom, and by what means obscene, lewd, lascivious, indecent, filthy, and vile articles, matters and things might be obtained.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT XVII

That on or about June 17, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the directions thereon, a certain envelope from the Eastern District of Pennsylvania to Ron Kirby, RD #3, Loganton, Pa. 17747, which envelope contained advertisements giving information where, how, from whom, and by what means obscene, lewd, lascivious, indecent, filthy, and vile articles, matters, and things might be obtained.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT XVIII

That on or about June 25, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the directions thereon, a certain envelope from the Eastern District of Pennsylvania to Ted Braswell, P.O. Box 500, Biglerville, Pa. 17307, which mailing envelope contained obscene, lewd, lascivious, indecent, filthy, and vile 200 feet roll of 8 mm color movie film entitled "Naughty Lady- Baseball Player", which depicts two females and one male engaged in cunnilingus, fellatio, intercourse; one (1) magazine entitled "Massage Parlors", which depicts various males and females engaged in fellatio, intercourse, cunnilingus, and ejaculation.

In violation of Title 18, United States Code, Section 1461.

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THE GRAND JURY FURTHER CHARGES:

COUNT XIX

That on or about July 2, 1975, in the Middle District of Pennsylvania,

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the directions thereon, a certain envelope from the Eastern District of Pennsylvania to T. Braswell, P.O. Box 500, Biglerville, Pa. 17307, which envelope contained advertisements giving information where, how, from whom, and by what means obscene, lewd, lascivious, indecent, filthy, and vile articles, matters, and things might be obtained.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT XX

That on or about July 2, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain mailing envelope from the Eastern District of Pennsylvania to T. Braswell, P.O. Box 500, Biglerville, Pa. 17307, which mailing

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envelope contained obscene, lewd, lascivious, indecent, filthy, and vile advertisements depicting fellatio, intercourse, and the insertion of a hand into the anal cavity of an individual.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT XXI

That on or about July 5, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain mailing envelope from the Eastern District of Pennsylvania to Ron Kirby, RD #3, Loganton, Pa. 17747, which mailing envelope contained obscene, lewd, lascivious, indecent, filthy, and vile advertisements depicting fellatio, intercourse, and the insertion of a hand into the anal cavity of an individual.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT XXII

That on or about July 16, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

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did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain envelope from the Eastern District of Pennsylvania to T. Braswell, P.O. Box 500, Biglerville, Pa. 17307, which envelope contained advertisements giving information where, how, from whom, and by what means obscene, lewd, lascivious, indecent, filthy, and vile articles, matters, and things might be obtained.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT XXIII

That on or about July 16, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain mailing envelope from the Eastern District of Pennsylvania to T. Braswell, P.O. Box 500, Biglerville, Pa. 17307, which mailing envelope contained obscene, lewd, lascivious, indecent, filthy, and vile advertisements depicting fellatio, intercourse, and the insertion of a hand into the anal cavity of an individual.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT XXIV

Appendix 2

That on or about July 17, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain envelope from the Eastern District of Pennsylvania to Ron Kirby, RD #3, Loganton, Pa. 17747, which envelope contained advertisements giving information where, how, from whom, and by what means obscene, lewd, lascivious, indecent, filthy, and vile articles, matters, and things might be obtained.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT XXV

That on or about July 17, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain mailing envelope from the Eastern District of Pennsylvania to Ron Kirby, RD #3, Loganton, Pa. 17747, which mailing envelope contained obscene, lewd, lascivious, indecent, filthy, and vile advertisements depiciting fellatio, intercourse, and the insertion of a hand into the anal cavity of an individual.

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In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT XXVI

That on or about July 26, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain mailing envelope from the Eastern District of Pennsylvania to T. Braswell, P.O. Box 500, Biglerville, Pa. 17307, which mailing envelope contained obscene, lewd, lascivious, indecent, filthy, and vile two (2) 200 feet rolls of 8 mm, color movie film entitled "Naughty Lady-Heavy Cream", which depicts one female and one male engaged in masturbation, fellatio, intercourse, and ejaculation; "Pretty Boy No. 7 Golden Shower", which depicts one male urinating on the second male.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT XXVII

That on or about July 26, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

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did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain mailing envelope from the Eastern District of Pennsylvania to Ron Kirby, RD #3, Loganton, Pa. 17747, which mailing envelope contained obscene, lewd, lascivious, indecent, filthy, and vile magazine entitled "Fuck" which depicts numerous males and females involved in fellatio and cunnilingus.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT XXVIII

That on or about July 31, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain mailing envelope from the Eastern District of Pennsylvania to Ted Braswell, P.O. Box 500, Biglerville, Pa. 17307, which mailing envelope contained obscene, lewd, lascivious, indecent, filthy, and vile magazine entitled "Erotic Hands", which depicts three males engaged in fellatio, insertion of a dildo in the anal cavity of one of the individuals, and insertion of a hand and arm of one of the three individuals into the anal cavity of another individual.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

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COUNT XXIX

That on or about August 2, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain mailing envelope from the Eastern District of Pennsylvania to Ron Kirby, RD #3, Loganton, Pa. 17747, which mailing envelope contained obscene, lewd, lascivious, indecent, filthy, and vile advertisements depicting fellatio, intercourse, and the insertion of a hand into the anal cavity of an individual.

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT XXX

That on or about August 15, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain mailing envelope from the Eastern District of Pennsylvania to T. Braswell, P.O. Box 500, Biglerville, Pa. 17307, which mailing envelope contained obscene, lewd, lascivious, indecent, filthy, and vile advertisements depicting fellatio, intercourse, and the insertion of a hand into the anal cavity of an individual.

Appendix 2

In violation of Title 18, United States Code, Section 1461.

THE GRAND JURY FURTHER CHARGES:

COUNT XXXI

That on or about August 13, 1975, in the Middle District of Pennsylvania

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

did knowingly use, and cause to be used, the mails for the mailing and carriage in the mails, and did knowingly cause to be delivered by mail according to the direction thereon, a certain mailing envelope from the Eastern District of Pennsylvania to Ron Kirby, RD #3, Loganton, Pa. 17747, which mailing envelope contained obscene, lewd, lascivious, indecent, filthy, and vile advertisements depiciting fellatio, intercourse, and the insertion of a hand into the anal cavity of an individual.

In violation of Title 18, United States Code, Section 1461.

A TRUE BILL

FORMAN

S. JOHN COTTONE
United States Attorney

PAUL J. KILLION
Assistant U.S. Attorney

JOHN E. HARRIS, Attorney
Department of Justice

ROBERT KENDALL, JR., Attorney
Department of Justice

APPENDIX 3 — MEMORANDUM AND ORDER

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA

v.

THOMAS W. SHERWOOD, d/b/a
SOVEREIGN ADVERTISING CO., INC.

CRIMINAL No. 76-101

MEMORANDUM AND ORDER

On November 16, 1976 defendant Thomas W. Sherwood was convicted by a jury of 27 counts of violation of 18 U.S.C. § 1461, which proscribes, *inter alia,* the distribution of obscene materials or advertisements pertaining thereto through the United States Mails. The materials that are the subject of the prosecution are various "hard core" pornographic films, magazines and advertising circulars which were mailed from defendant's place of business in Philadelphia to various fictitious addresses within this district in response to orders placed by a United States Postal Inspector. Defendant has filed a motion to set aside the verdict and enter a judgment of acquittal, or, in the alternative for a new trial. For reasons hereinafter set forth, this motion will be denied.

STATE LAW AS DEFINING COMMUNITY STANDARDS

The most substantial of defendant's numerous attacks on the validity of the verdict involves a novel attempt to compel a federal jury to decide a federal case in accordance with state law. To understand defendant's argument it is helpful to bear in mind the three-part definition of obscenity enunciated by the Supreme

Court in MILLER v. CALIFORNIA, 413 U.S. 15, 37 L ed 2d 419 (1972):

> "The basic guidelines for the trier of fact must be: (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest. . . ; (b) whether the work depicts or describes in a patently offensive way, sexual conduct specifically defined by the applicable law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value. . . ." 413 U.S., at 24, 37 L ed 2d, at 431.

The former Pennsylvania statute proscribing the distribution of obscene materials, 18 C.P.S.A. § 5903(a) was invalidated on constitutional grounds in COMMONWEALTH v. MacDONALD, 464 Pa. 453, 347 A.2d 290 (1975). Defendant contends that the subsequent failure of the Pennsylvania legislature to enact a successor statute establishes a statewide community standard under which any form of commercial exploitation of sex is permissible, and which precludes a federal jury from finding any material distributed wholly within this state to be obscene.

To the extent that defendant contends that the absence of a viable state statute precludes prosecution under state law for the intrastate distribution of pornography, he is of course correct. The statute under which defendant has been convicted, however, operates independently of state law. It is based on the exclusive power of Congress, arising from Article I, § 8, Clause 7 of the United States Constitution to regulate the postal system. In the exercise of this power Congress may deny the use of the mails for any purpose which it deems contrary to public policy, regardless of whether such activity is permissible under state law.

PARR v. UNITED STATES, 363 U.S. 370, 4 L ed 2d 1277 (1960); UNITED STATES v. STATES, 488 F.2d 761 (8th Cir. 1973). The Pennsylvania legislature can adopt any policy it desires in regard to the distribution of pornography within the scope of the state's police power; but Pennsylvania cannot, either through action or inaction confer constitutional protection on obscenity, as defined in MILLER, *supra*, or impair the power of Congress to make the mailing of such material a criminal offense. *See* ROTH v. UNITED STATES, 365 U.S. 476, 493-94, 1 L ed 2d 1498, 1511-12 (1957).

In a prosecution under 18 U.S.C. § 1461, the jury may find the material in question obscene only if it meets the three-part MILLER test quoted above. UNITED STATES v. HAMLING, 418 U.S. 87, 41 L ed 2d 590 (1974). As the Supreme Court made abundantly clear in HAMLING, the "contemporary community standards" element of that test is not a matter of policy which can be legislated, as defendant contends, but rather an objective standard which the jurors must be allowed to ascertain on the basis of their knowledge of the attitudes and sensibilities of the community in which they live. 418 U.S., at 104-106, 41 L ed 2d, at 613-614. The failure of the state legislature to enact a statute punishing the sale of pornography does nothing to alter the sexual attitudes of the community at large, and the jury in this case did not err by taking cognizance of those attitudes in determining the community standard under which these materials were to be judged.

We do not mean to suggest that defendant could not have placed the lack of a state statute before the jury as evidence of the community standard, arguing that what the community does not ban it does not find offensive. We hold only that legislative inaction in the area of obscenity does not compel the jury to disregard its knowledge of the norms of the district from which it is drawn and conclude that the community standard is "anything goes".

Defendant also contends that the absence of a state statute regulating pornography left him with no standard against which to measure his conduct, and thus renders the federal statute unconstitutionally vague as applied to him. This argument also rests on the erroneous assumption that state law is somehow incorporated into the definition of obscenity under 18 U.S.C. § 1461. It is true that § 1461 is couched in vague general terms and needs further specification of the type of materials proscribed to render it constitutionally adequate. The needed specificity, however, is not to be found in the law of any state, but in the decisions of the United States Supreme Court. In HAMLING v. UNITED STATES, *supra*, 418 U.S. at 114, 41 L ed 2d at 618, the Court, following a lengthy discussion of prior cases construing § 1461, held that the imprecise terms of that statute are to be understood as proscribing only the sort of "patently offensive representations or descriptions of the specific 'hard core' sexual conduct given as examples in MILLER v. CALIFORNIA."[1] As so construed, § 1461 provides constitutionally adequate notice of what conduct may result in prosecution without reference to any state statute.

THE COURT'S REFUSAL TO GRANT A CONTINUANCE

Four of the nine points pressed by defendant in support of his motion relate to a certain tax collection operation conducted by the Internal Revenue Service (IRS) and defendant's efforts to discover the details thereof, which must be set forth in some detail. Shortly prior to trial defense counsel learned that in April 1976 the IRS had seized the contents of an adult bookstore in

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1. In MILLER the Court described the type of obscenity which can constitutionally be proscribed with the following examples: (a) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. (b) Patently offensive representations or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals. 413 U.S. at 25, 37 L ed 2d at 431.

Philadelphia in satisfaction of tax liabilities, and, as provided by the Internal Revenue Code, 26 U.S.C. §6335, had disposed of the seized goods by sealed bid sale, soliciting bids in part by notices sent through the United States Mails. Counsel also had reason to believe that much of the material seized and sold by the IRS was identical to the material that his client had been indicted for distributing. Concluding that evidence of a sale of identical material by an agency of the United States Government would be valuable in his case, defense counsel on September 22, 1976 wrote to the attorney for the government requesting disclosure of the details of the IRS activities. On September 29, 1976 the attorney for the government responded to this inquiry, stating that his office had no knowledge of the matter, and suggesting that inquiries be made directly to the IRS. Subsequently, on October 19, 1976 defense counsel sent a letter of inquiry to the IRS, and on the same date requested the court by letter to grant a continuance to allow him to further explore this possibly exculpatory evidence. We refused to grant a continuance at that time, and trial commenced as scheduled on Monday, November 8. Meanwhile the attorney for the government had himself requested information concerning the bookstore seizure from the IRS, and had received a response late on the afternoon of Friday, November 5, 1976.

The information that the attorney for the government received from the IRS on November 5 consisted of a Notice of Seizure, listing all items seized; three notices of sale, two of which had been published in the Philadelphia Enquirer, and one of which had been distributed to prospective bidders through the mails; and a Certificate of Sale of Seized Property. This was turned over to defense counsel on the morning of November 8, at which time defense counsel again sought a continuance to further investigate the matter, and the court again refused to grant the request.[2]

2. This account of the events surrounding defendant's motion for a continuance is taken from the transcript of proceedings (hereinafter Tr.), at 1-11.

Defendant contends that the information concerning the seizure and sale of adult material by the IRS is exculpatory material within the purview of BRADY v. MARYLAND, 373 U.S. 83, 10 L ed 2d 215 (1963), and that refusal to grant a continuance after disclosure on the morning of trial denied him any meaningful use of the information and thus denied him due process.[3] We agree with defendant that the involvement of the IRS in the distribution of pornography is BRADY material. Sale by the government of films and magazines identical to those which are the subject of the indictment, while not excusing defendant's activities, is certainly powerful evidence that the material in question does not offend contemporary community standards, and defendant should in no way be prevented from putting such evidence before the jury. However, we do not believe that the late disclosure in this instance hampered the presentation of defendant's case sufficiently to require that the verdict be set aside.

Despite the time strictures imposed upon him by the court, defendant was able to secure the presence at trial of Phillip Marcella, the Revenue Officer who directed the seizure and sale of the contents of the bookstore, and Robert Foxhill and Robert Rego, both of whom were involved in the purchase of the seized materials. Through the testimony of these three witnesses defendant was able to set forth the essential facts of the transaction: that the IRS had seized and sold certain sexually explicit materials, that advertisements concerning the sale had

3. Defendant does not suggest that the delay in making this information available to him was the result of any attempt at concealment on the part of the prosecutor. The record indicates that following defense attorney's initial inquiry on the matter, the prosecutor promptly sought the requested data from the IRS, and upon receiving it promptly turned it over to the defense. Defendant's objection is only that, given the late date at which the material became available, a continuance was necessary to allow him to fully prepare his defense.

been distributed to prospective bidders through the mails, and that the goods so sold included items identical to those for which defendant was being prosecuted.

Defense counsel thus had on the record all that was necessary to allow him to argue to the jury his theory that the government, in making this sale had established a community standard under which the distribution of this material is permissible. It is hard to conceive how any further information concerning the details of the sale would have in any way enhanced defendant's position.

Defendant further contends that denial of a continuance prevented him from acquiring copies of the seized materials to present as evidence of community standards. *See* HAMLING v. UNITED STATES, *supra,* 418 U.S. at 125, 41 L ed 2d at 625 (1974); SMITH v. CALIFORNIA, 361 U.S. 147, 171, 4 L ed 2d 205, 221 (1959). If defendant sought to introduce the very goods seized by the IRS, he sought to do the impossible, for by the time of trial those goods had long since been sold to Mr. Foxhill, who had in turn distributed them to others (Tr. 377). If defendant wished to present other readily available pornographic material comparable or identical to that for which he was indicted as evidence of community standards, he had ample opportunity to procure it between July 21, 1976, the date of the indictment, and November 8, 1976, the day on which the trial began. His decision not to do so cannot be attributed to our decision not to grant a continuance.

Defendant's final point in regard to the seizure and sale of pornographic matter by the IRS arises from a statement made in court by the attorney for the government on November 10. At that time it was stated that the Department of Justice had determined that no prosecutions would be brought against the IRS officers responsible for the use of the mails in connection

with the sale of the seized pornography (Tr. 73-75). In response to this statement, defense counsel alleged that the decision not to prosecute could only be the result of an investigation wherein Justice Department personnel examined the seized material and found it to be not obscene (Tr. 75). It is contended that failure to release to the defense all information pertaining to such investigation violates the mandate of BRADY v. MARYLAND, *supra,* and thus compels a new trial.

If the Department of Justice or any other agency had conducted an investigation which resulted in a determination that the seized matter was not obscene, any records or memoranda thereof would indeed be BRADY material. However, there is no evidence in the record to indicate that any such investigation was ever undertaken. The attorney for the government has consistently represented to the court that the only information received or considered by the Justice Department in relation to this matter was that which was released to the defendant on the morning of November 8.[4]

GRAND JURY

Defendant takes note of the fact that the indictment in this case charges in the language of the statute, 18 U.S.C. § 1461, and does not set forth the constituent elements of obscenity enumerated by the Supreme Court. From this defendant concludes that the grand jury which handed down the indictment was not properly instructed on the elements of the crime, and that he was thus denied due process. This argument is completely frivolous. The indictment framed in the language of §

4. The decision that no one would be prosecuted in connection with this sale appears to be based on no more than an ad hoc determination that, regardless of the nature of the materials in question, it is not the policy of the Justice Department to prosecute isolated incidents of distribution by Revenue officers acting within the scope of their employment (Tr. 73-74).

1461 is fully sufficient to define the nature of the charges against defendant, and the fact that it does not contain more information suggests nothing about the conduct of the grand jury proceedings. UNITED STATES v. HAMLING, 481 F.2d 307 (9th Cir. 1973), *aff'd*, 418 U.S. 87, 41 L ed 2d 590 (1974). Moreover, even if the grand jury had acted under a misapprehension of law, it would not amount to a denial of due process. Defendant has been adquately protected against a miscarriage of justice by the instructions given to the petit jury at trial. UNITED STATES v. COSTELLO, 350 U.S. 359, 100 L ed 2d 397 (1956); UNITED STATES v. POLIZZI, 500 F.2d 856 (9th Cir. 1974); *cf.* UNITED STATES v. CALANDRA, 414 U.S. 338, 38 L ed 2d 561 (1974).

MULTIPLICITY

Each of the thirty-one counts of the indictment charged defendant with a separate mailing of obscene articles or advertisements. Defendant asserts that the separate mailings are manifestations of but two crimes: the use of the mails to distribute obscene articles, and the use of the mails to distribute advertisements for such articles. It is urged that the court erred in not requiring the indictment to be consolidated into two counts. Defendant relies heavily on UNITED STATES v. UNIVERSAL C.I.T. CREDIT CORP., 344 U.S. 218, 97 L ed 260 (1952), where the Supreme Court affirmed a lower court order consolidating a multiple count indictment under the Fair Labor Standards Act, 29 U.S.C. § 201, et seq., into three counts, each alleging violation of one section of the act. The UNIVERSAL C.I.T. decision, however, is based on a detailed analysis of the history and purposes of the Fair Labor Standards Act, and is simply not applicable to an obscenity case. More relevant to this prosecution are cases under the mail fraud statute, 18 U.S.C. § 1341, which, like the statute involved here, is addressed to the prevention of misuse of the mails. These cases have uniformly held that each mailing, although done in

furtherance of a single scheme constitutes a separate offense. BADDERS v. UNITED STATES, 240 U.S. 391, 60 L ed 706 (1916); UNITED STATES v. SCHALL, 371 F.Supp. 912 (W.D. Pa. 1974); UNITED STATES v. MAHANY, 305 F.Supp. 1205 (N.D. Ill. 1969).

We doubt that we could properly impose cumulative sentences for multiple mailings of the same publication, but each mailing nonetheless constitutes an indictable offense, and defendant suffered no prejudice in being charged with each in a separate count. *See* BRAMBLETT v. UNITED STATES, 231 F.2d 489 (D.C. Cir. 1956).

DEVIANT APPEAL

Several of the books and magazines in evidence are intended to appeal to a deviant sexual group; to wit, homosexuals. Defendant argues that the jury could not validly find this material obscene in the absence of expert testimony to show that it indeed appeals to the prurient interest of that group. In support of this contention defendant cites UNITED STATES v. KLAW, 350 F.2d 155 (2d Cir. 1965), the only federal obscenity case where expert testimony has been held necessary to establish prurient appeal. KLAW dealt with very specialized pornographic material of such an arcane nature that the unaided jury would be unable to assess its sexual significance.[5] Other cases which have dealt with "hard core" depictions of obvious sexual acts, whether normal or perverted, have uniformly held that the jury needs no expert guidance to recognize prurient appeal. *See, e.g.* KAPLAN v. CALIFORNIA, 413 U.S. 115, 37 L Ed 2d 492 (1972); UNITED STATES v. GRONER, 479 F.2d

5. "It may well be that there are characters and cults to which exaggerated high heels, black patent leather bindings and bondages poses have some occult significance, but we doubt that any court would take judicial notice of the reaction that deviates — or the average man — might have to such stimuli." 320 F.2d at 166.

577 (5th Cir. 1973); UNITED STATES v. MANARITE, 448 F.2d 583 (2d Cir. 1973); UNITED STATES v. WILD, 422 F.2d 34 (2d Cir. 1970). In PARIS ADULT THEATRE I, 413 U.S. 39, 37 L ed 2d 446 (1973), the Supreme Court suggested that expert testimony may be necessary "where contested material is aimed at such a bizarre deviant group that the experience of the trier of fact would be plainly inadequate to judge whether the material appeals to the prurient interest." 413 U.S. at 517, 37 L ed 2d at 456 *n.*6. The materials in this case certainly contain photographs of some rather unusual homosexual activities, but taken as a whole they are not so alien to the realm of common experience that the jury could not evaluate their prurient appeal without expert guidance.

Defendant's motion will be denied.

An appropriate order will be entered.

s/ R. Dixon Herman
R. Dixon Herman
United States District Judge

Dated: (illegible)

Supreme Court, U. S.
FILED
AUG 15 1978
MICHAEL RODAK, JR., CLERK

No. 77-1756

In the Supreme Court of the United States

OCTOBER TERM, 1978

THOMAS W. SHERWOOD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

PHILIP B. HEYMANN,
Assistant Attorney General,

JOSEPH S. DAVIES, JR.,
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In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 77-1756

THOMAS W. SHERWOOD, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The judgment order of the court of appeals (Pet. App. 1a-3a) is reported at 568 F. 2d 771. The district court's memorandum and order denying post-trial relief (Pet. App. 24a-34a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 6, 1978. The petition for a writ of certiorari was filed on May 8, 1978, and is therefore out of time under Rule 22(2) of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court erred in not charging the jury that it had to find that petitioner's materials appealed to the prurient interests of a deviant group.

2. Whether the government failed to satisfy its burden of proof.

3. Whether the trial court abused its discretion in denying petitioner's request for a continuance.

4. Whether the government violated its obligation under *Brady* v. *Maryland*, 373 U.S. 83, to supply information petitioner requested from the Internal Revenue Service.

5. Whether the indictment should have been dismissed because the prosecutor allegedly failed to inform the grand jury of the elements of petitioner's offense.

6. Whether the indictment properly charged petitioner with multiple violations of 18 U.S.C. 1461.

STATEMENT

After a jury trial in the United States District Court for the Middle District of Pennsylvania, petitioner was convicted of 27 counts of mailing obscene material, obscene advertisements, and information on how to obtain obscene materials, in violation of 18 U.S.C. 1461. Petitioner was fined $27,000 and placed on three years' probation. The court of appeals affirmed by judgment order (Pet. App. 1a-3a).

The evidence at trial showed that Postal Inspector John Ruberti, assigned to investigate violations of the obscenity laws, ordered and received a quantity of magazines, advertisements and films from petitioner's catalog (Tr. 88-96). These materials depicted homosexual and heterosexual acts of sodomy, masturbation, intercourse and oral-genital contact (Tr. 506).

ARGUMENT

1. Petitioner contends (Pet. 5-7) that the district court erred in not charging the jury that, in order to convict, it had to find that the materials appealed to the prurient interests of a deviant group. Petitioner failed to object to the court's instructions before the jury retired (Tr. 527-528), and thus should not be allowed to object now. See Rule 30, Fed. R. Crim. P.; *Henderson* v. *Kibbe*, 431 U.S. 145, 154; *United States* v. *Bennett*, 563 F. 2d 879, 882 (C.A. 8); *United States* v. *Wild*, 422 F. 2d 34, 37 (C.A. 2), certiorari denied, 402 U.S. 986.

In any event, the district court's instruction was not erroneous. It required the jury to consider whether the "average person," applying community standards, would find that the work, taken as a whole, appealed to "prurient interest" (Tr. 510-514). That is all that was necessary. See *Hamling* v. *United States*, 418 U.S. 87, 107; *Miller* v. *California*, 413 U.S. 15, 24. Although the court may require that the jury decide whether the material appeals to the prurient interests of members of deviant social groups, such an instruction is not essential. Cf. *Pinkus* v. *United States*, No. 77-39, decided May 23, 1978, slip op. 9.[1]

Moreover, even assuming that such an instruction should have been given, petitioner was not prejudiced by

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[1]This Court's decision in *Mishkin* v. *New York*, 383 U.S. 502, is not on point. That case dealt with the question whether materials designed for, and primarily disseminated to, a clearly defined deviant sexual group, rather than the public at large, satisfied the test of prurient appeal in *Roth* v. *United States*, 354 U.S. 476. This Court concluded that the reference to the "average" or "normal" person in *Roth* did not foreclose consideration of the appeal of such materials to their "probable recipient group." *Mishkin* v. *New York*, *supra*, 383 U.S. at 509. *Mishkin* thus does not support petitioner's contention that the failure to instruct with regard to deviant groups requires reversal.

its omission, because these materials were more likely to appeal to the prurient interests of homosexuals than to those of average persons. See Pet. 8; *Hamling* v. *United States*, *supra*.

2. Petitioner also contends (Pet. 7-9) that the government failed to prove that the materials appealed to the prurient interests of a deviant audience because there was no expert testimony to that effect.

But "[w]hether materials are obscene generally can be decided by viewing them; expert testimony is not necessary." *Pinkus* v. *United States*, *supra*, slip op. 9. See *Hamling* v. *United States*, *supra*, 418 U.S. at 100; *Ginzburg* v. *United States*, 383 U.S. 463, 465. Petitioner's claim is that the materials supposedly appealed to a "bizarre deviant group," and so expert testimony was necessary. See *Paris Adult Theatre I* v. *Slaton*, 413 U.S. 49, 56 n. 6. However, this was not an "extreme" case where the trier of facts was "plainly inadequate" to judge the appeal of the materials. See *Pinkus* v. *United States*, *supra*, slip op. 10. The fact that many of the materials were produced for homosexuals does not require expert testimony on their obscenity *vel non*. The hypothetical "bizarre deviant groups" which *Slaton* mentioned were those of which even a present-day jury would be ignorant. Homosexual activity is not so bizarre that a jury cannot comprehend it.

3. Petitioner further contends (Pet. 9-13) that the court improperly denied his request, just prior to trial, for a continuance.

Shortly before trial, petitioner learned that in April 1976, the Internal Revenue Service (IRS) had seized the contents of an adult bookstore in Philadelphia in satisfaction of tax liabilities, and had sold the contents after soliciting bids through the mails. Petitioner believed that some items sold were identical to those involved in

petitioner's case, and he requested information from government counsel relating to this sale. Government counsel was unaware of the sale but sought IRS' help in locating what was requested. Late on November 5, a Friday, the prosecutor received from IRS the notice of seizure listing the items seized, three notices of sale and the certificate of sale; he turned these over to petitioner's counsel the following Monday morning before trial (Tr. 1-11). Petitioner then sought a continuance, which the court denied.

The record plainly contradicts petitioner's claim that he was prejudiced by the denial of the continuance. At trial, petitioner's witnesses included the IRS revenue officer who had conducted the seizure and sale of the materials in the earlier case and the purchasers of those materials. Their testimony established that the IRS seized sexually explicit materials, advertised their sale through the mails, and sold items identical to some of those specified in petitioner's indictment. Given this testimony, it is difficult to see what a continuance would have added to petitioner's argument that, by selling these items, the government deemed that they did not offend community standards. In fact, petitioner's sole claim is that with more time he could have obtained the actual materials sold by IRS. Even assuming that he could have done so, denial of the continuance was not error. The testimony presented clearly proved petitioner's point.[2] A denial of a

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[2]To be sure, it is an embarrassment that the Department of Justice should find itself prosecuting petitioner for distributing materials which another agency of the United States government recently had publicly sold. On March 23, 1977 (following petitioner's conviction), the IRS issued a supplement to IRM 5341.1 ordering that IRS agents contact local authorities immediately after seizing possibly obscene materials, and before advertising or offering it for sale, "to determine whether possession of such material

continuance is within the discretion of the trial court. *Ungar* v. *Sarafite*, 376 U.S. 575, 589; *United States* v. *Little*, 567 F. 2d 346 (C.A. 8), certiorari denied, No. 77-6130, April 17, 1978. There was no abuse of that discretion in this case.[3]

4. Equally misconceived is petitioner's contention (Pet. 13-15) that the government's production of the IRS

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violates any local law." Thus the situation that occurred here is not likely to recur.

In any event, petitioner was fully entitled, as he did, to argue to the jury that the IRS action was persuasive evidence that the materials were not in fact obscene. But as the district court rightly concluded (Pet. App. 30a-31a), neither the IRS sale, nor the decision not to prosecute the IRS agents involved, constituted a binding determination that the materials were not obscene. As the Ninth Circuit said in *Spillman* v. *United States*, 413 F. 2d 527, 531, certiorari denied, 396 U.S. 930, in regard to a similar claim that the government's mailing of obscene materials estopped it from asserting that the defendants had violated the law by mailing the same materials:

> The question of whether the governmental employees connected with the postal authorities have violated the law would not be relevant to the issue of appellant's guilt or innocence. Obviously, when an agent mailed the evidence (films) during the course of the investigation it was without any specific intent to violate the law. The appellant's contention that he was being denied due process of the law on account of the non-prosecution of the governmental employees is wholly lacking in merit.

Much less would these governmental actions authorize the trial court to rule, as a matter of law, that the materials were protected. Furthermore, the latter point was not urged at trial or in the court of appeals and is therefore not now properly presented for review. *United States* v. *Lovasco*, 431 U.S. 783, 788 n. 7; *Adickes* v. *S.H. Kress & Co.*, 398 U.S. 144, 147 n. 2.

[3]Petitioner's request (Pet. 21) that this Court review the materials is not well founded. Independent review is to be made only when necessary. *Miller* v. *California*, 413 U.S. 15, 25. Given the absence of merit to petitioner's claim, this is not such a case.

materials on the morning of trial deprived him of due process of law under *Brady* v. *Maryland*, 373 U.S. 83.

In the first place, because the information petitioner sought was a matter of public record, it is unlikely that it qualifies as *Brady* material, *i.e.*, "information * * * known to the prosecution but unknown to the defense." *United States* v. *Agurs*, 427 U.S. 97, 103. Furthermore, the prosecution in this case had no knowledge of the sale conducted by the IRS (Pet. App. 28a). Finally, *Brady* material need not be made available until trial. See *United States* v. *Dotson*, 546 F. 2d 1151, 1153 (C.A. 5); *United States ex rel. Lucas* v. *Regan*, 503 F. 2d 1, 3 (C.A. 2), certiorari denied, 420 U.S. 939.[4]

5. Although no minutes exist of the grand jury proceedings (Tr. 11), petitioner contends (Pet. 16-17) that the trial court should have dismissed the indictment because the government allegedly failed to advise the grand jury as to the elements of the offense.

Even assuming that petitioner's unfounded charge is true, it is well settled that review of grand jury proceedings extends only to whether the grand jury is legally constituted, unbiased, and its indictment valid on its face. See *United States* v. *Calandra*, 414 U.S. 338; *Lawn* v. *United States*, 355 U.S. 339; *Costello* v. *United*

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[4]Petitioner argues (Pet. 13-15) that *Brady* material must be supplied well in advance of trial. He cites three cases, none of which supports this proposition. *United States* v. *Leichtfuss*, 331 F. Supp. 723 (N.D. Ill.); *United States* v. *Gleason*, 265 F. Supp. 880 (S.D. N.Y.); *United States* v. *Ladd*, 48 F.R.D. 266 (D. Alas.). Both *Leichtfuss* and *Ladd* state that the government must turn over to the defendant any exculpatory material prior to trial, but they set no time requirement. *Gleason* states that *Brady* materials may not have to be provided until trial (265 F. Supp. at 884), although it notes that in some instances, where the use of the materials would assist in effective trial preparation, they should be supplied before trial. *Id.* at 885.

States, 350 U.S. 359. Petitioner makes no such claim. As the district court said in rejecting this "completely frivolous" argument, petitioner was "adequately protected" by that court's instructions to the jury (Pet. App. 31a-32a).

6. Petitioner further contends (Pet. 17-19) that the indictment improperly charged him with multiple counts of the same offense because he was charged separately for each of his mailings. This contention lacks merit. Under the mail fraud statute, 18 U.S.C. 1341, each use of the mails is a separate offense despite the fact that the defendant may be engaged in only one fraudulent scheme. *Badders* v. *United States*, 240 U.S. 391; *United States* v. *Crockett*, 534 F. 2d 589 (C.A. 5); *United States* v. *Calvert*, 523 F. 2d 895 (C.A. 8), certiorari denied, 424 U.S. 911. Applying this reasoning here, charging separate offenses based on separate mailings was proper.[5]

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[5]The cases cited by petitioner do not support his contention. In *United States* v. *Harman*, 38 Fed. 827 (D. Kan.), an 1889 case, the district court ruled that since the same publication was sent to four individuals, in four separate mailings, there was one offense. Here, petitioner mailed different publications. *Bramblett* v. *United States*, 231 F. 2d 489 (C.A. D.C.), certiorari denied, 348 U.S. 503, involved the falsification of disbursing documents by a member of Congress, who received monthly checks made out to a member of his staff. The court held that the statute involved, 18 U.S.C. 1001, was designed to punish a pattern of conduct, and not to penalize each act in a series of acts which manifests the pattern. *Dimenza* v. *Johnston*, 130 F. 2d 465 (C.A. 9), held that, under an earlier version of the bank robbery statute, bank robbery by the use of deadly weapons was the same as bank robbery aggravated by the use of a deadly weapon and thus only one offense should have been charged. Cf. *Simpson* v. *United States*, No. 76-5761, decided February 28, 1978.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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